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## A Leap of Faith: TWAIL Meets Caribbean Queer Rights Jurisprudence—Intersections with International Human Rights Law

H. Patrick Wells

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*This article examines the legal status of queer rights in Caribbean jurisprudence. It conducts an analysis of Caribbean queer rights case law, in order to arrive at an understanding of the extent and dynamics of constitutional protection for these rights. It then uses the revelations from this analysis to determine how Caribbean queer rights jurisprudence has intersected with international human rights norms, values and rules. Finally, the article applies the TWAIL methodological approach to international law to argue that the Caribbean queer rights jurisprudence has not so far reflected the counter-hegemonic, resistance, anti-imperialist discourse that TWAIL champions, in spite of the socio-cultural and political Caribbean realities of homophobia. This homophobia mirrors some of the key conceptual notions and impulses of the TWAIL critique of international human rights law. I further argue that TWAIL, in spite of a number of its concerns about some of the norms and values found in international human rights law, including those related to gay rights, can nevertheless accommodate equality-seeking queer rights/human rights, if the core assumption is that queer rights ultimately are about the rule of law and democracy. I conclude that even though Caribbean courts are at an infancy in their reach to protect queer rights on the premise of international human rights norms, they have nevertheless certainly taken a leap of faith on an equality-preserving trajectory.*

*Dans le présent article, nous examinons le statut juridique des droits des personnes gaies dans la jurisprudence des pays des Caraïbes. Nous analysons cette jurisprudence afin de comprendre l'étendue et la dynamique de la protection constitutionnelle de ces droits dans ces pays. Nous utilisons ensuite les données tirées de cette analyse pour examiner les rapports entre cette jurisprudence et les normes, valeurs et règles internationales en matière de droits de la personne. Enfin, nous appliquons l'approche méthodologique utilisée par le mouvement TWAIL (Third World Approaches to International Law) pour soutenir que la jurisprudence relative aux droits des personnes gaies dans les pays des Caraïbes n'a pas jusqu'ici tenu compte du discours anti-hégémonique et anti-impérialiste que le mouvement TWAIL défend, malgré les réalités socioculturelles et politiques de l'homophobie qui existe dans les Caraïbes. Cette homophobie reflète certaines des principales notions au cœur de la critique du droit international en matière de droits de l'homme effectuée par TWAIL. Je soutiens en outre que TWAIL, malgré plusieurs de ses préoccupations au sujet de certaines normes et valeurs du droit international en matière de droits de la personne, y compris celles liées aux droits des personnes gaies, peut néanmoins accommoder les droits de ces personnes qui revendiquent l'égalité, si l'hypothèse de base est que leurs droits reviennent en fin de compte à une question de primauté du droit et de démocratie. Je conclus que même si les tribunaux dans les pays des Caraïbes n'en sont qu'à leurs premiers pas dans la protection des droits des personnes gaies sur la base des normes internationales des droits de la personne, ils ont néanmoins fait un acte de foi en faveur de la préservation de l'égalité.*

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\* BA, MSc (Pol Sci), MSc (Soc), LLB, LL.M., Attorney-at-law, Ontario, Canada. My deepest gratitude to Professor Elizabeth F Judge, for all her assistance.

*Introduction*

- I. *Approaches to queer rights in Caribbean societies*
- II. *Theoretical framework—third world approaches to international law (TWAIL)*
- III. *Queer rights and human rights in Commonwealth Caribbean jurisprudence—intersections with international human rights law*
- IV. *TWAIL and Caribbean queer rights jurisprudence*

*Conclusion*

*Introduction*

This article is about queer rights jurisprudence in the context of the Caribbean polity. This area of the law in the Caribbean is at an infancy stage. In this article, I have three key objectives. My first objective is to conduct an analysis of the small body of Caribbean queer rights jurisprudence in order to arrive at an understanding of the extent of constitutional protection that has fermented for these rights in the region. My second objective is to assess the degree to which the protections for queer rights found in the jurisprudence reflect international human rights law norms and values. My third is to frame an argument that, despite a strong social and cultural opposition in the Caribbean to what are described as Eurocentric international queer rights norms, values and legal principles embodied in international human rights law, courts in the Caribbean have been taking a tentative leap of faith into that world, demonstrating a degree of willingness to embrace such norms and values. The courts have been gently repudiating typical Caribbean/Third World objections and opposition to “normalizing” those international norms and values, which is a scepticism shared by the Third World Approaches to International Law (TWAIL) narrative.

This article makes four contributions: (i) it formulates and articulates a narrative and an understanding of how Caribbean courts think about matters of queer rights’ protection in the context of regional/domestic socio-cultural norms; (ii) it explores the intersection of Caribbean queer rights jurisprudence with international human rights law; (iii) it interrogates the neo-colonial, counter-hegemonic narrative about queer rights that is typical in Caribbean society and which is a partial reflection of the skepticism towards international human rights law found broadly in TWAIL; and (iv) it explores the potential for finding common ground

between the Caribbean queer rights jurisprudence and TWAIL, on the basis of shared ideologies grounded in the *rule of law* and *democracy*.

Following this Introduction, Part I sets out an overview of the approaches to queer rights in Caribbean societies. Generally, there is a strong cultural resistance to the flourishing of queer rights in the region. In many instances, this resistance is visceral, leading on several occasions to the use of violence against persons who openly present in ways that are alleged or perceived to be queer by the public at large. This attitude projects a kind of refutation of what is deemed to be a normalization of queer rights. Typically, the antipathy that is demonstrated is contextualized in cultural or religious terms and is aimed at articulating what is considered to be a rejection of “illegitimate” international trends on sexual “permissiveness.”

Part II of the article briefly explains and discusses the methodological framework of TWAIL. This Part highlights the ethical and intellectual struggles engaged by TWAIL scholars, in exposing and reforming those parts of international law that are said to reinforce inequality, unfairness and unjustness in the global order. As a methodological approach, TWAIL points to the “heaven/hell binary” that it claims stands in the way of the cross-fertilization of ideas and perspectives in international law generally, and in international human rights law in particular. This binary, according to TWAIL, casts the First World as “heaven” and the Third World as “hell,” relative to the protection of norms and values that epitomize a respect for human rights. This results in a kind of dynamic where the “Western gaze” on the so-called human rights records of Third World states stigmatizes rather than respects. This, ultimately, in the view of TWAILers, challenges the legitimacy of the statehood and governance of these Third World states without giving due regard to the full cycle of historical exploitation and abuse that produced and feeds these cycles of alleged human rights violations, thereby “elitizing” international law.

Part III analyzes the current body of Caribbean queer rights jurisprudence. The cases presented are from the Caribbean Court of Justice (a regional court), and from the high (superior) and appellate courts in individual territories: Trinidad and Tobago, Bermuda, and Belize. The core subject matters arising in these cases are sexual intimacy in the form of “buggery,” same-sex marriage, immigration and cross-dressing. While these headings do not cover the widest gambit of all potential litigation that could arise on queer rights in the region, the trajectory of litigating queer rights in the Caribbean is at an early stage, and there is the potential for far greater litigation.

Part IV argues that Caribbean queer rights jurisprudence, for the most part, reflects a trend towards accepting international human rights

law norms and values. This trend is demonstrated in the repeated reliance on principles and opinions from international human rights tribunals or decision-making bodies, as well as from domestic courts in other jurisdictions such as Canada, India, and South Africa. The decisions examined in this Part of the article also reflect a trend to associate Caribbean constitutional and human rights provisions with the wider norms of international human rights protection, by making linkages and highlighting similarities and equivalences in international human rights instruments such as the *European Convention on Human Rights* and the *International Covenant on Civil and Political Rights*. In this way the courts appear to be locating their vindication of queer rights in the wider spectrum of international human rights law, rather than in cloistered, cultural, and localized expectations and norms. This section of the article also argues that Caribbean queer rights jurisprudence appears to disempower the hard core notions of counter-hegemony and resistance to neo-colonial human rights norms found in TWAIL scholarship, in favour of finding a more nuanced “made in the Caribbean” implementation of international human rights norms. Further, the section assesses whether queer rights equality-seeking interests in the Caribbean can be accommodated within the TWAIL regime of ideas at all. The view this article takes, in this regard, is that an accommodation is possible, considering that in seeking to protect queer rights, the core goals of the courts are the upholding of the rule of law and the protection of democratic values. This is certainly not unlike what Third World states, as a whole, seek as well. The protection of queer rights should, therefore, be viewed not through the prism of cultural invasion and Western penetration, but instead through the prism of such considerations as equality before the law, respect for personal autonomy and human dignity, and respect for free agency and expression—considerations that coherently preserve the rule of law and democracy. Part V offers a brief conclusion.

Ultimately, what this article aims to show is that instead of a blanket rejection or unqualified embrace of international human rights norms, values and laws on queer rights, or an outright rejection of the socio-cultural realities of homophobia in the Caribbean region, the courts are engaged in a slow, delicate manoeuvre, aimed at persuading reasonable minds, through clinical reasoning and the assertion of a kind of judicial authority of “rightness” and fairness that they hope will resonate. In other words, the courts are not appearing to judge Caribbean norms and values, which in their view are counter-intuitive to wider norms of respect for and preservation of human dignity, but are instead engaging in a process that I would call legalistic “proclaiming and rationalizing,” hoping that their

judicial proclamations and rationalizations gradually receive institutional, political and social approbation.

As this article shows, Caribbean courts are thoroughly open to applying settled legal human rights principles to queer human rights, not only from the regional diaspora but also from the proverbial “imperialist,” “neo-colonialist” sphere. On repeated occasions, judgments from Canada, Australia, the United Nations Human Rights Committee, the Inter-American Court of Human Rights and the European Court of Human Rights (ECtHR) are considered favourably and are used as critical guides to the resolutions arrived at in the local cases. There is also an evident reliance on international human rights instruments such as the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR).

### I. *Approaches to queer rights in Caribbean societies*

Although things have been lethargically changing within the last few years, historically, there has been a visceral opposition to the advancement of queer rights in the broad socio-cultural dynamic of Caribbean societies. According to Holness, “the Caribbean’s apprehension to Lesbian, Gay, Bisexual, Trans, and Intersex (LGBTI) rights advocacy is deeply rooted in the region’s tragically oppressive colonial experience.”<sup>1</sup> As such, many persons in the Caribbean view the “attempt by the West toward more tolerance for the gay community as post-colonial imperialism,”<sup>2</sup> a view consistent with Massad’s that the global “same-sex” rights movement is a neo-colonial/Western enterprise.<sup>3</sup> In a 2013 article dealing with the promulgation of the Cayman Islands Constitution in 2009, Vlcek captures poignantly the broad strokes of Caribbean animus to queer rights. He claimed that the citizens in that Caribbean territory viewed the Bill of Rights in the proposed Constitution at the time as “a form of subterfuge intended to force this ostensibly global norm for sexual preference on them”<sup>4</sup> by the government of the United Kingdom (the Cayman Islands

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1. Toni Holness, “Lesbian, Gay, Bisexual, Trans, and Intersex Rights in the Caribbean: Using Regional Bodies to Advance Culturally Charged Rights” (2013) 38:3 *Brook J Intl L* 925 at 926. (Holness notes that for his article, “The acronym LGBTI is used...to include other variations of the acronym, such as, LGBTQ (Lesbian, Gay, Bisexual, Trans, Queer/Questioning), and other sexual minorities.” In this article, I adopt a similar position, but will use “gay rights” and “queer rights” interchangeably as well to reference all sexual minorities as a whole).

2. Charlene L Smith & Ryan Kosobucki, “Homophobia in the Caribbean” (2011) 1 *J L & Soc Deviance* 1 at 32.

3. Joseph Massad, “Re-orienting Desire: The Gay International and the Arab World” (2002) 14:2 *Public Culture* 361.

4. William Vlcek, “Crafting Human Rights in a Constitution: Gay Rights in the Cayman Islands and the Limits to Global Norm Diffusion” (2013) 2:3 *Global Constitutionalism* 345 at 346.

being a British Overseas Territory). Vleck describes this “subterfuge” as the introduction of a norm, not through ‘socialization, institutionalization, and demonstration,’ as the means of incorporating queer rights, but rather through a process of “norm cascade” or direct imposition through “dominant mechanisms,”<sup>5</sup> representing a forced transfer of “modern” norms as a potential example of “imperialist/neo-colonial modernization.”<sup>6</sup>

Vleck’s narrative reflects the core underpinnings of the approach taken by international human rights cultural imperialism scholars such as Mutua, who writes of the “damning metaphor” of “Savages-Victims-Saviors,” which, he argues, fuels the current human rights paradigm.<sup>7</sup> Mutua argues that human rights rhetoric encamps governments into either the good or the “evil” state, with the “evil” state, typically Third World in definition, being deemed by the good state to be one that expresses itself “through an illiberal, anti-democratic, or other authoritarian culture” that works as the “operational instrument of savagery” when deviation from Western cultural expectations occurs.<sup>8</sup> Mutua elaborates in this way:

The simple, yet complex promise of the savior is freedom: freedom from the tyrannies of the state, tradition, and culture. But it is also the freedom to create a better society based on particular values. In the human rights story, the savior is the human rights corpus itself, with the United Nations, Western governments, INGOs, and Western charities as the actual rescuers, redeemers of a benighted world. In reality, however, these institutions are merely fronts. The savior is ultimately a set of culturally based norms and practices that inhere in liberal thought and philosophy.<sup>9</sup>

Mutua’s approach is, therefore, a scholarly representation of the views of wide sectors of Caribbean societies, which criticize international human rights movements as characteristically Eurocentric. Those in Caribbean societies that hold this view largely also reflect the position taken by Mutua that these “Eurocentric” international human rights movements are seeking to shame other cultures as being the “savage” that is inferior and which is operating extra-normatively of Western cultural norms. This theoretical framework has been adopted in other parts of the literature by scholars such as McKinley, who, in relation to asylum claims, for example, asserts that the international human rights paradigm demonstrates “the

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5. *Ibid* at 347.

6. *Ibid* at 368.

7. Makau Mutua, “Savages, Victims and Saviors: The Metaphor of Human Rights” (2001) 42 Harv Intl LJ 201 at 214-217 [Mutua, “Metaphor”].

8. *Ibid* at 203.

9. *Ibid* at 204.



paradigmatic example of post-colonial rescue and the contemporary extension of the maternal imperialist project.”<sup>10</sup>

This embroidery of views on the culturally imperialistic essence of international human rights law, particularly in relation to queer rights, in large measure contextualizes why homophobia in the Caribbean region<sup>11</sup> has sometimes been a part of not only the legal politic, but also of the expressive culture, such as in music.<sup>12</sup> This homophobia has also been commonly characterized by virulent incidents of public resentment, and has often been articulated through collective violence against queer persons.<sup>13</sup> The murder of 16 year-old Dwayne Jones, a cross-dressing teenager, by a mob in July 2013 in Montego-Bay, Jamaica, is a tragic illustration of such violence. As pointed out by Human Rights Watch at the time of this incident relative to attitudes in the Jamaican society at the time:

If someone does not conform to gender expectations...they face widespread verbal and physical abuse that can range from beatings to armed attacks to murder...They are often driven from their homes and communities. The Jamaican government has a poor record of investigating and holding to account those who commit violence because of the victim's sexual orientation or gender identity. Some individuals have sought to justify Jones' killing with comments in mainstream or social media that he provoked the attack by 'bringing his behavior into the public.'<sup>14</sup>

Even in political circles, leadership in Jamaica has displayed a similar resistance to the normalization of queer rights,<sup>15</sup> and commensurately,

10. Michelle A McKinley, “Cultural Culprits” (2009) 24 Berkeley J Gender Law & Just 91 at 103.

11. See generally David McFadden, “Gays Live—and die—in fear in Jamaica” *Associated Press* (20 July 2009), online: <<http://www.sandiegouniontribune.com/sdut-cb-jamaica-gay-bashing-071909-2009jul19-story.html>> [https://perma.cc/UL5G-4YJB]; Smith & Kosobucki, *supra* note 2; Robert Carr, “On ‘Judgments’: Poverty, Sexuality-Based Violence and Human Rights in 21st Century Jamaica” (2003) 2 Caribbean J Social Work 71; Tim Padgett, “The Most Homophobic Place on Earth” (12 April 2006) Time.com, online: <<http://content.time.com/time/world/article/0,8599,1182991,00.html>> [https://perma.cc/H7ND-7DPC]

12. Camille A Nelson, “Lyrical Assault: Dancehall versus the Cultural Imperialism of the North-West” (2008) 17 S Cal Interdisciplinary LJ 231.

13. See generally Human Rights Watch, “This Alien Legacy: The Origins of ‘Sodomy’ Laws in British Colonialism” (2008), online: <<https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>> [https://perma.cc/9DGW-S7S9]

14. “Jamaica: Cross-Dressing Teenager Murdered Investigate, Condemn Violence, Respect Rights of LGBT People” *Human Rights Watch* (1 August 2013), online: <<https://www.hrw.org/news/2013/08/01/jamaica-cross-dressing-teenager-murdered>> [https://perma.cc/HW9P-QLD3]

15. Nicholas Laughlin, “Jamaica, Caribbean: No Gays in Golding’s Government” *Global Voices* (23 May 2008), online: <<https://globalvoices.org/2008/05/23/jamaica-caribbean-no-gays-in-goldings-government/>> [https://perma.cc/5BEE-WXBM]; Athaliah Reynolds-Baker, *Not in my Cabinet: Representations of Gay People in the Jamaican Print Media* (MA Thesis, University of Leicester, October 2014) [unpublished].



where that leadership has expressed or hinted at any openness or willingness to accommodate reasoned discussion on the matter, there is an oppositional reaction from the general public and from other political figures. In 2011 during the general election debate in Jamaica, when one candidate for prime minister, Portia Simpson Miller, indicated that she would not have a policy banning homosexuals from serving in her cabinet were she to become the prime minister (as one former prime minister had said he would), the energy minister at the time, Clive Mullings, warned that “God [had] brought down fire and brimstone on Sodom and Gomorrah.”<sup>16</sup>

All of this is part of the fabric of resistance to the international human rights approach to queer rights and largely reflects the melody of the culturally conservative approach to these rights in the Caribbean. As one advocate of this resistance notes, there has been a “centrality and manipulation of sexuality and sexual rights in struggles for and against the civilizing mission that lies at the heart of key aspects of globalization.”<sup>17</sup> This is essentially a questioning of the democratic legitimacy of international human rights law.<sup>18</sup> It is no wonder, therefore, that the creation of the Caribbean Court of Justice, a regional court, was seen as marking “the closing of a circle on independence” and the “sunset of British colonial rule.”<sup>19</sup> This contextualizes the view that because of the Caribbean’s “shared socio-cultural characteristics,” consensus on the way forward should emerge from regional norms rather than from external imposition or transplantation of gay rights advocacy.<sup>20</sup> As this paper reveals in Parts III and IV, however, the courts in the Caribbean now do not appear to share this view and are entirely inclined to formulate an approach to queer rights validation that is largely and meaningfully informed by what is happening and has happened on the wider international human rights scene. In fact, one of the most positively transformative decisions that is examined in this article emerged from the Caribbean Court of Justice and addressed a subject matter that many would perhaps view as an entirely Caribbean anathema: cross-dressing among queer men in public spaces.

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16. The Economist, “Go Sista—Sodom and Mrs. Simpson Miller,” *The Economist Group Limited* (London, 7 January 2012), online: <<https://www.economist.com/the-americas/2012/01/07/go-sista>> [<https://perma.cc/R67F-WXTT>] (Mrs. Simpson-Miller was affectionately referred to by the population as “Sista P,” an abbreviated reference to her first name, “Portia,” hence the title “Go Sista...”)

17. Katherine Franke, “Dating the State: The Moral Hazards of Winning Gay Rights” (2012) 44:1 *Colum HR LR* 1 at 2.

18. See generally Douglas Leo Donoho, “Democratic Legitimacy in Human Rights: The Future of International Decision-Making” (2003) 21 *Wis Intl LJ* 1.

19. See generally Leonard Birdsong, “Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English-Speaking Caribbean” (2005) 36 *U Miami Inter-American L Rev* 197.

20. Holness, *supra* note 1 at 945.

Against the background of this framework and narrative of “cultural resistance,” it, therefore, becomes apposite to analyse and understand the degree to which the coalescing of international human rights norms, values and expectations around an expanding body of rules in the international arena has influenced the way in which queer rights protections are evolving in the Caribbean. Before conducting this analysis, I situate the TWAIL narrative in international human rights law, in order to provide context to the arguments to be made in Part IV.

## II. *Theoretical framework—third world approaches to international law (TWAIL)*

So far in the region, the cases that have emerged on the protection of queer rights as human rights suggest a tentative drift towards a general embrace of international human rights trends. This portends a tension between the TWAIL approach to international human rights norms and the overall direction of Caribbean Courts on queer rights.

The pith and substance of the TWAIL perspective is an opposition to what is perceived as the broadly unequal, unfair and unjust nature of international law rules that very often, though not always, reinforce Third World domination and subordination.<sup>21</sup> One of the things that undoubtedly unites TWAIL scholars is their opposition to a politics that is grounded in the notion of the “empire” versus others.<sup>22</sup> As described by al Attar et al:

TWAIL is an alternative narrative of international law that has developed in opposition to the realities of domination and subordination prevalent in the international legal apparatus. A fundamentally counter-hegemonic movement, TWAIL is united in its rejection of what its champions regard as an unjust relationship between the Third World and international law.<sup>23</sup>

Similarly, Eslava et al explain that:

Although there is arguably no single theoretical approach which unites TWAIL scholars, they share both a sensibility, and a political orientation. TWAIL is therefore ... defined by a commonality of concerns. Those concerns centre around attempting to attune the operation of International law to those sites and subjects that have traditionally been positioned as the ‘others of international law.’<sup>24</sup>

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21. See generally Obiora C Okafor, “Marxian Embraces (and De-Couplings) in Upendra Baxi’s Human Rights Scholarship: A Case Study” in Susan Marks ed, *International Law on the Left: Re-Examining the Marxist Legacies* (Cambridge: Cambridge University Press, 2008) 252 [“Marxian”].

22. See generally BS Chimni, “The Past, Present and Future of International Law: A Critical Third World Approach” (2007) 8:2 Melbourne J Intl L 499.

23. Mohsen al Attar and Rebekah Thompson, “How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination” (2011) 3:1 Trade Law & Development 65 at 67.

24. Luis Eslava and Sundhya Pahuja, “Between Resistance and Reform: TWAIL and the Universality of International Law” (2011) 3:1 Trade Law & Development 103 at 104.

As a result of this positioning, TWAIL scholars are “solidly united to a shared ethical commitment to the intellectual and practical struggle to expose, reform, or even retrench those features of the international legal system that help to create or maintain the generally unequal, unfair, or unjust global order...taking the lives and experiences of...[the] Third World much more seriously than has generally been the case.”<sup>25</sup> In this context, the act of exposing the colonial features and structural framework of international law is considered to be fundamental to understanding the current international legal order.<sup>26</sup> In this sense, TWAIL is, therefore, almost certainly a part of the fabric of critical internationalism.<sup>27</sup>

In relation to international human rights law specifically, TWAIL scholars have consistently articulated a series of concerns that have been discussed in many parts of the literature. As presented by Okafor, these include the “heaven/hell binary,” the “one-way traffic paradigm,” the “orientation of the Western gaze,” “stigmatization of the Third World,” and the “conceptual economy of appearances.”<sup>28</sup> Okafor’s initial argument is that current international human rights law operates from the dichotomous paradigm of the “heavenly” versus the “hellish.” In this paradigm, the West is deemed to be good, while the Third World is consistently type-cast as bad.<sup>29</sup> What emerges in this scenario, in Okafor’s view, is a *monologue* flowing from the “West” to the rest. Instead of a *dialogue* that can ultimately forge a kind of “mass cultural legitimacy” in international human rights law, there is a dynamic of alienation. This binary, concludes Okafor, is “at best, arrogance, and at worst, disingenuous.”<sup>30</sup> It contributes to the tenuous attraction of certain international human rights norms in some parts of the Third World.<sup>31</sup> The reality, argues Okafor, presents a certain irony, as

25. Obiora C Okafor, “Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective” (2005) 43 Osgoode Hall LJ 171 at 176 [Okafor, “Newness”].

26. Antony Anghie, “Time Present and Time Past: Globalization, International Financial Institutions, and the Third World” (2000) 32 NYU J Intl L & Pol 243 at 245-246 [Anghie, “Globalization”].

27. Makau Mutua, “What is TWAIL?” (2000) 94 American Society of International Law Proceedings 31 at 31.

28. Obiora C Okafor, “International Human Rights Fact-Finding Praxis in its Living Forms: A TWAIL Perspective” (2014) 1 Transnational Human Rights Review 59 at 66-67 [Okafor, “International”].

29. See generally OC Okafor & SC Agbakwa, “Re-Imagining International Human Rights Education in Our Time: Beyond Three Constitutive Orthodoxies” (2001) 14 Leiden J Intl L 563 [Okafor & Agbakwa, “Re-Imagining”]; Mutua, “Metaphor,” *supra* note 7; Upendra Baxi, *The Future of Human Rights* (Delhi: Oxford University Press, 2006) at 4 [Baxi, “Future of Human Rights”]; Upendra Baxi, “‘A Work in Progress’: The United States’ Report to the United Nations’ Human Rights Committee” (1995) 35 Indian J Intl L 34 [Baxi, “Work in Progress”]; Upendra Baxi, “Random Reflections on the [Im]possibility of Human Rights,” online: <<https://www.pdhre.org/dialogue/reflections.html>> [https://perma.cc/2CRD-3PME] [Baxi, “Random Reflections”].

30. Okafor & Agbakwa, “Re-Imagining,” *ibid* at 574.

31. See e.g. CA Odinkalu, “Why More Africans Don’t Use Human Rights Language” (2000) 2:1 Human Rights Dialogue 3 at 3-4.

even in Western societies there are obvious contradictions in the extent to which countries adhere to human rights.<sup>32</sup> The ultimate challenge, as Okafor sees it, is, therefore, that this binary projects an absolutism that stands in the way of perfectly legitimate cross-fertilization of human rights ideas and perspectives, across the North South global divide. The crux of the critique is that this is untenable, as there exists no place that is so “heavenly” that it repudiates any possibility of questioning, criticism, revision or enlargement, considering that those things that are determined to be human rights emerge from some social, political or economic force. Scholars such as Mutua have strongly argued this perspective.<sup>33</sup>

The result, argue TWAIL scholars, is the one-way flow of what is considered good and bad in international human rights law. This one-way flow, says Okafor, derives “a logical end product of a conceptualization of human rights...as a one-way traffic paradigm in which human rights knowledge, scrutiny and supervision tends to flow from...the West, which supposedly invented human rights...in the direction of those regions of the world...which *apparently* did not invent human rights.”<sup>34</sup> One of the most apparent consequences of this intellectual mirage, argues Okafor, is that it reinforces and systematizes a “racialized hierarchy in Third World societies,” making these societies the perennial subjects of human rights investigations, condemnations and allegations of human rights violations. This, according to Marsh et al, flows from the fact that:

What we today call “universal human rights” are to a great extent the product of Western societies...[These rights] emerged from a particularly Western historical context and [were] influenced by a number of Western contingencies, none of which are likely to be reproduced in other parts of the world. [Nevertheless]...the...articulation of these ideas bears little or no relation to their acceptance by other cultures.<sup>35</sup>

32. EK Quashigah & Obiora C Okafor, “Toward the Enhancement of the Relevance and Effectiveness of the Movement for the Securement of Legitimate Governance in Africa” in E.K. Quashigah & OC Okafor, eds, *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (The Hague: Kluwer Law International, 1999) 539 at 553. See also Mutua, “Metaphor,” *supra* note 7 at 211.

33. See e.g. Mutua, “Metaphor,” *supra* note 7 at 217; Makau Mutua, “The Ideology of Human Rights” (1996) 36 *Va J Intl L* 589 [Mutua, “Ideology”]; Antony Anghie, “Francisco de Vitoria and the Colonial Origins of International Law” (1996) 5 *Social & Legal Studies* 321; and P Hountondji, “The Master’s Voice—Remarks on the Problem of Human Rights in Africa” in UNESCO, *Philosophical Foundations of Human Rights* 319 at 320-332 (Paris: UNESCO, 1986).

34. Okafor, “International,” *supra* note 28 at 72; See also Baxi, “Future of Human Rights,” *supra* note 29 at 4; Baxi, “Work in Progress,” *supra* note 29; Baxi, “Random Reflections,” *supra* note 29.

35. Christopher Marsh & Daniel P Payne, “The Globalization of Human Rights and the Socialization of Human Rights Norms,” (2007) *BYU L Rev* 665 at 671.

This, as some scholars see it, results in a situation where global human rights juggernauts devote their human rights activism towards the Third World,<sup>36</sup> with very little focus on the First/Western/Northern World.<sup>37</sup>

TWAIL scholars point out that the “heaven” and “hell” binary and the resultant one-way flow of international human rights norms causes a consistent gaze on the Third World by the West, stigmatizing those parts of the world as the problem spots. This gaze reinforces questioning and challenging of the legitimacy of Third World statehood, governance and practices.<sup>38</sup> Because of this, whenever any action or series of actions is identified by the West as a violation of human rights in these Third World states, condemnation heaps upon them, as “[w]hatever the Western eye recognizes as a violation of human rights tends to become widely recognized as such, and whoever the Western eye sees as a pariah, as the ‘bad guy,’ tends to become widely viewed as such...”<sup>39</sup> It is this state of affairs that causes mainstream international human rights discourse to treat Third World culture as retrograde to Western human rights norms, notions and values.<sup>40</sup> In this way, Third World culture is stigmatized as almost always violative of human rights, as if human rights are culture-free.<sup>41</sup>

Separate and apart from this diminution of Third World cultures as part of the fabric of the inculcation of Western/First World international human rights norms, TWAIL scholars also argue that there is the production of what is referred to as a “conceptual economy of appearances.” In explaining this concept, Okafor indicates that it is where a:

36. See J Smith & R Pagnucco, “Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s” (1998) 20 Human Rights Quarterly 379 at 386.

37. Mutua, “Metaphor,” *supra* note 7 at 216-217.

38. See Obiora C Okafor, *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa*, (The Hague: Martinus Nijhoff, 2000) [Okafor, “Legitimate Statehood”]; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007) [Anghie, “Imperialism”]; Makau Mutua, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties” (1995) 35 Va J Intl L 339 [Mutua, “Banjul Charter”].

39. Okafor, “International,” *supra* note 28 at 76.

40. See C Nyano, “How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries” (2000) 41 Harv Intl LJ 381; Mutua, “Banjul Charter,” *supra* note 38; Obiora C Okafor, “Attainments, Eclipses and Disciplinary Renewal-in International Human Rights Law: A Critical Overview” in D Armstrong, ed, *Routledge Handbook of International Law* (London: Routledge, 2009) at 307 [Okafor, “Attainments”]; and A Riles, “Anthropology, Human Rights and Legal Knowledge: Culture in the Iron Cage” (2004) 15 Finnish Yearbook of Intl L 9.

41. See D Bell, *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999); AA An’im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1995); J Donnelly, “The Relative Universality of Human Rights” (2007) 29 Human Rights Quarterly 281; PT Zeleza, “The Struggle for Human Rights in Africa” in PT Zeleza & PJ McConaughay, eds, *Human Rights, The Rule of Law, and Development in Africa* (Philadelphia: University of Pennsylvania Press, 2004).

person, group, or country is featured as a culprit (or human rights violator) without necessarily fingering the full cycle of consumption, exploitation, abuse, and so on, that fed or feed the chain of events that ultimately produced the violation...[ignoring] the lack of in-depth knowledge of the history and context that frame [the problem]... impos[ing] a problematic or even harmful conceptual economy of appearances that decontextualizes and therefore distorts...the situation...<sup>42</sup>

The way in which this impacts the international human rights discourse, according to TWAIL scholars, is that trumpeted human rights violations identified by the “saviours” of the West are not viewed through the prisms of wider economic facts and histories that give cause and context to these “violations,” but instead are denoted as failings solely of the governments and institutions of these “violating” Third World states. In other words, this is a wilful blindness to the antecedent conduct of hegemonic imposition and manipulation of Third World socio-political and socio-economic realities—impositions and manipulations that in turn give rise to some of the very failings of the Third World states which are ultimately condemned by these hegemonic states and actors. The “saviours” thereby ignore the element of the “capture” by Western hegemons. As summarized by Eslava et al., “[t]he most significant point of departure of TWAIL from what might loosely be called ‘mainstream’ interpretations of international law, is in TWAIL’s insistence that issues of material distribution and imbalances of power affect the way in which international legal concepts, categories, norms and doctrines are produced and understood.”<sup>43</sup>

It is these notions of normativity and universalism in international human rights law that TWAIL sets out to resist,<sup>44</sup> accordingly “de-elitizing” international law.<sup>45</sup> As Rajagopal points out, in spite of how much human rights has become entangled in a discourse of “military intervention, economic reconstruction and social transformation,” it is nevertheless still “legitimate to use international law as an explicit counter hegemonic tool of resistance.”<sup>46</sup> As he sees it, there is clearly room for human rights discourse to be influenced by “counter-hegemonic struggles across a range

42. Okafor, “International,” *supra* note 28 at 81.

43. Eslava & Pahuja, *supra* note 24 at 105.

44. John D Haskell, “TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law” (2014) 27 Can JL & Jurisprudenc 383 at 399.

45. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003) at 292.

46. Balakrishnan Rajagopal, “Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy” (2006) 27:5 Third World Quarterly 767 at 770 and 772 [Rajagopal, “Counter-Hegemonic”].

of areas.”<sup>47</sup> In other words, TWAILers must speak “truth to power.”<sup>48</sup> Importantly however, it is necessary to point that:

...the argument is not necessarily that the human rights conditions in the Third World are either ideal or even at par with the situation in Western states. We do recognize that there is a hellish dimension to the lives of the majority of the inhabitants of the Third World. However, we also recognize the fact that such hellish conditions are not absolute. Third World states are hells and heavens to varying extents, depending on whom you ask. So are Western states.<sup>49</sup>

Conceptually, this “resistance,” anti-imperialism construct which is characteristic of TWAIL is a useful approach to the analysis in this article, bearing in mind the matters raised in Part I about Caribbean realities and attitudes towards queer rights. It is this resentment towards what is perceived as imperialist cultural and legal penetration that is articulated, for instance, in the popular and expressive culture of some Caribbean countries as mentioned in Part I, and which will help to determine the extent to which this perception of the “invasion” of international human rights law norms, in respect of the protection of queer rights, has impacted Caribbean jurisprudence. This jurisprudence will now be examined.

### III. *Queer rights and human rights in Commonwealth Caribbean jurisprudence—intersections with international human rights law*

The key subjects of Caribbean queer rights jurisprudence are sexual intimacy in the form of “buggery,” immigration, same-sex marriage, and cross-dressing. These issues emerge from a study of six cases and concern the fundamental human rights of privacy, free expression, freedom from non-discrimination, equality before the law, and equal protection by the law. What the cases show is that Caribbean courts are on a path of advancing queer rights through their jurisprudence and that this advancement has trended towards an acceptance and reflection of international human rights norms, values and rules. The courts in these cases demonstrate this bent by observing and relying on jurisprudence not only from overseas (“First World”) jurisdictions and international courts and tribunals, but also by exercising a conscious and deliberate embrace of international law treaties and instruments, as part of the *praxis* of crafting their judgments. Likewise, there are consistent references to and acknowledgements of the foundational bases of several of the Constitutions of the region on international human rights law instruments, such as the UDHR, the

47. Rajagopal, “Counter-Hegemonic,” *ibid* at 772.

48. Michael Fakhri, “Questioning TWAIL’s Agenda” (2012) 14 *Or Rev Intl L* 1 at 11.

49. Okafor & Agbakwa, “Re-Imagining,” *supra* note 29 at 572.



ICCPR, and the *American Declaration on the Rights and Duties of Man*, either in whole or in part. All of this leads to the conclusion that, based on the evidence from the case law, the courts are breaking new ground in the Caribbean, by relying on international human rights norms to protect, at least to some degree, the human rights litigated by the queer applicants. The only exception is the *Tomlinson* case, but as I argue below, the decision in that case was simply wrong. In spite of this singular digression, the evidence nevertheless demonstrates an obvious trajectory in the protection of queer rights by Caribbean courts.

It is important to note, however, that this path that the courts are on is not yet to be viewed as a revolutionary, “full speed ahead” “guns blazing” march which relegates Caribbean reservations and socio-cultural reluctances to jurisprudential oblivion. This is made clear in *Orozco*<sup>50</sup> for instance, where the Court stated that “it needs to be made pellucid that [the] claim [stood] to be decided on the provisions of the Belize Constitution, and in [that] regard, the court [stood] aloof from adjudicating on any moral issue.”<sup>51</sup>

On the evidence that I will provide below, it is therefore arguable that the courts, in determining queer rights matters in the context of wider international human rights norms and values, are not acting consistent with the wider negative and less than conciliatory attitudes that are prevalent in the region on these issues. Recalling, for example, the apprehension in the Caribbean to queer rights advocacy addressed by Holness, it appears from the discussion below that the courts do not share such an “apprehension” in the judicial posture that they have adopted. To the contrary, what seems to be occurring instead is a judicial intellectualizing by the courts, which assumes a sort of openness and willingness to consider the “newness” of ideas and “freshness” of approaches to the phenomenon of queer rights in the region. To a certain degree, this also represents a new dialectic where decisions are being made not *on account* of the common perceptions and expectations regarding queer persons and the features of queer existence in the Caribbean, but rather *in spite* of the same. This new dispensation projects an aura of judicial self-confidence and independence that is

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50. *Orozco v Attorney General*, *infra* note 66 at para 53.

51. The court in *Jones v Attorney General* also made a similar point when it said, “This conclusion is not an assessment or denial of the religious beliefs of anyone. This court is not qualified to do so. However, this conclusion is a recognition that the beliefs of some, by definition, is not the belief of all and, in the Republic of Trinidad and Tobago, all are protected, and are entitled to be protected, under the Constitution. As a result, this court must and will uphold the Constitution to recognize the dignity of even one citizen whose rights and freedoms have been invalidly taken away” (*infra* note 52 at para 174).

noteworthy, as it features a palpable dissonance between what the majority of the people in the Caribbean would expect from the courts on the one hand and where the courts appear to want to shift the queer rights/human rights compass, on the other hand.

In the first case, *Jones v Attorney General*,<sup>52</sup> the High Court of Trinidad and Tobago dealt with the criminal offences of “buggery” and serious indecency under sections 13 and 16 of the *Sexual Offences Act*, respectively. Section 13 criminalized “sexual intercourse per anum by a male person with a male person or by a male person with a female person,”<sup>53</sup> while section 16 outlawed “[any] act, other than sexual intercourse...involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.”<sup>54</sup> The claimant’s complaint was that both provisions were “unconstitutional, illegal, null, void, invalid and...of no effect to the extent that [they criminalized]...consensual sexual conduct between adults.” According to Jones, the rights affected were individual liberty and security, equality before the law, protection of the law, private and family life, and freedom of thought and expression. He further articulated the ground of unusual treatment or punishment, on account of the terms of imprisonment related to both offences.<sup>55</sup>

The Court agreed with the claimant that both provisions were violations of the Trinidad and Tobago Constitution and it modified the subject provisions. The Court held that the impugned provisions infringed upon or were likely to contravene the claimant’s fundamental rights.<sup>56</sup> The main focus for the Court was the right to privacy, of which, it reasoned, sexual orientation was an important aspect.<sup>57</sup> In the view of the Court:

human dignity [was] a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/

52. *Jones v The Attorney General of Trinidad and Tobago (and The Equal Opportunity Commission, The Trinidad and Tobago Council of Evangelical Churches, The Sanatan Dharma Maha Sabha of Trinidad and Tobago—Interested Parties)*, Claim No CV2017-00720, The High Court of Justice of the Republic of Trinidad and Tobago, delivered 12 April 2018 (unreported) [*Jones v Attorney General*].

53. *Sexual Offences Act*, 1986, Chap 11:28, Laws of Trinidad and Tobago, s 13(2). The substantive offence of “buggery” is in s 13(1) and carries a maximum penalty of 25 years’ imprisonment.

54. *Ibid* s 16(3). The substantive offence of serious indecency is in s 16(1) and carries a maximum penalty of 5 years’ imprisonment.

55. *Sexual Offences Act*, *supra* notes 53 and 54.

56. In arriving at this view, the court applied a “generous and purposive” approach to the interpretation of the Constitution. It relied on such cases as *Attorney General v Jobe*, 1984 AC 689; *Minister of Home Affairs v Fisher*, 1980 AC 319; *Reyes v R*, 2002 UKPC 11; *Matthew v The State*, 2004 UKPC 33; *Hunter v Southman*, 1984 2 SCR 145.

57. The Court relied on the Indian case *Puttaswamy v Union of India*, 2012 Writ Petition (Civil) No 494, which emphasized that sexual orientation was an essential attribute of privacy, which was “inextricably linked to human dignity” (*Jones v Attorney General*, *supra* note 52 at 29.)

himself without any unreasonable intervention by the State...[S]he/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and with whom to make a family...A citizen should not have to live under the constant threat, the proverbial ‘sword of Damocles’, that at any moment [he] may be persecuted or prosecuted...<sup>58</sup>

The Court further held that the State had no reasonable justification for this interference with the claimant’s fundamental right to private family life. In making that determination, the Court relied on both domestic and international jurisprudence. For instance, the Court referenced both the *Canadian Charter of Rights and Freedoms* and the Supreme Court of Canada case *R v Oakes*<sup>59</sup> and highlighted that rights and freedoms can only be subject to “reasonable limits prescribed by law...[and] demonstrably justified in a free and democratic society.”<sup>60</sup> This is not particularly unlike section 13(1) of the Trinidad and Tobago Republican Constitution, which uses similar language: not “reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual.”<sup>61</sup>

The Court did not stop at Canadian jurisprudence, but also referenced “the position in democratic societies” by alluding for example to the European Court of Human Rights (ECtHR) in such cases as *Dudgeon v United Kingdom*,<sup>62</sup> *Norris v Ireland*<sup>63</sup> and *Modinos v Cyprus*.<sup>64</sup> Very important for the purposes of this article as well, the Court also referenced Article 17 of the ICCPR, specifically making use of the *Toonen v Australia* decision of the United Nations Human Rights Committee (UNHRC) in which the Committee held that “it is undisputed that adult consensual sexual activity in private is covered by the concept of ‘privacy’” and continued that even if the law interfering with this right is not enforced, “[t]he continued existence of the challenged provision...directly ‘interferes’ with the [individual’s] privacy...[A]ny interference with privacy must be proportional to the end sought and be necessary in the circumstances of

58. *Jones v Attorney General*, *supra* note 52 at 29-30.

59. 1986 1 SCR 103; SC J No. 7.

60. *Charter of Rights and Freedoms*, s 1, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

61. It is instructive to note that in *Jones v Attorney General*, Rampersad J, pointed out that “the test seems to be substantially the same between section 1 of the [Canadian] *Charter* and section 13 of the [Trinidad and Tobago] Constitution with the only apparent difference being a limit which is *reasonable* and can be *demonstrably* justified, in the case of the former, as opposed to one which is *reasonably* justified, in the case of the latter. To my mind, there is no material difference” (*ibid* at p 41).

62. 1981 4 EHRR 149.

63. 1989 13 EHRR 1862.

64. 1993 16 EHRR 6853.

any given case....”<sup>65</sup> This resort to international standards and norms was explicitly acknowledged by the Court when it stated at paragraph 106 of the judgment that “the consolidation of rights and freedoms of the individual... is necessarily fashioned out of local experience and culture with due regard being paid to the international norms in relation to individuals.”

The case of *Orozco v Attorney General*<sup>66</sup> from Belize also dealt with the matter of sexual intimacy involving “buggery.” The claimant in that case challenged the constitutional validity of section 53 of the *Belize Criminal Code*,<sup>67</sup> which states that “[e]very person who has carnal intercourse against the order of nature with any person or animal shall be liable to imprisonment for ten years.” The basis for the claim was that the provision interfered with the rights to human dignity, personal privacy and privacy of the home, private life, equal protection under the law, and further, was an abridgement of the right not to be subjected to arbitrary or unlawful interference with privacy.<sup>68</sup> Like the *Jones* court in Trinidad and Tobago, the court in *Orozco* turned its eyes to international jurisprudence, and specifically to the reasoning of the ECtHR, in holding that section 53 had violated the claimant’s right to privacy:

In *Dudgeon v UK* A 45 [1981] ECHR 7525/76, the European Court of Human Rights stated the following in its judgment in a reference made to the Court by a homosexual male in Northern Ireland:

“In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life; either he respects the law and refrains from engaging - even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits

65. *Toonen v Australia*, Communication No 488/1992, Human Rights Committee, adopted 31 March 1994, at paras 8.2-8.3.

66. *Caleb Orozco v The Attorney General of Belize (and The Commonwealth Lawyers Association, The Human Dignity Trust, The International Commission of Jurists, The Roman Catholic Church of Belize, The Belize Church of England Corporate Body, The Belize Evangelical Association of Churches and United Belize Advocacy Movement—Interested Parties)*, Claim No 668 of 2010, The Supreme Court of Belize, delivered 10 August 2016 (unreported).

67. *Criminal Code*, 2000, CAP. 101.

68. The *Constitution of Belize*, 1981 (Rev 2011). Section 3 of the Constitution of Belize reads: “Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely (a)...;(b)...; (c) protection for his family life, his personal privacy, the privacy of his home and other property and recognition of his human dignity....” Section 6(1) reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.” Section 14(1) reads: “A person shall not be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. The private and family life, the home and the personal correspondence of every person shall be respected.”

such acts and thereby becomes liable to criminal prosecution.”<sup>69</sup>

The Court “gratefully” adopted this position in its own analysis to establish standing on the claimant’s part.

In *Orozco*, just as in *Jones*, the Court adopted a purposive approach<sup>70</sup> to the constitutional provisions litigated by the claimant and embraced the view that the Constitution was a “living instrument.” Relative to the central role of international law, the Court remarked that the Constitution of Belize “[owed] its provenance to the *European Convention on Human Rights* [ECHR] which in turn was influenced by the *UN Declaration of Human Rights*, [and] as such, decisions in relation to human rights issues have been informed by developments in international law.”<sup>71</sup> In further reliance on this guidance, the Court also acknowledged that “the streams of domestic law and international law ought to flow in the same direction in establishing fundamental norms applicable to the rights conferred by the Constitution.”<sup>72</sup> This approach by the *Orozco* Court was a clear acceptance of the role of core international human rights norms and values, where domestic constitutional and human rights were being litigated in home courts.

The right to privacy was one of the main planks of the analysis conducted by the *Orozco* Court. It grounded the privacy discussion in the notion of human dignity and called on assistance from jurisprudence in Canada,<sup>73</sup> South Africa<sup>74</sup> and Europe<sup>75</sup> on this issue. This approach was entirely consistent with the Court’s consideration of the right to freedom of expression as a second basis for vindicating the claimant’s contentions. The Court considered the leading ECtHR case of *Handyside v UK*, declaring that freedom of expression was “consistent with and complementary to the diversity and difference of opinion contemplated in the [Belize] Constitution.”<sup>76</sup> Equality was the final arm of the Court’s analysis, and again, international law was front and centre. The Court adopted the reasoning of the UNHRC in the *Toonen v Australia* case, which was litigated under the ICCPR. The result of course was a holding

69. *Orozco v Attorney General*, *supra* note 66 at 20.

70. In this regard, the Court placed heavy reliance on the case of *Nadan and McCoskar v The State*, 2005 FJHC 500, a Fijian case; and *Reyes v The Queen* 2002 UKPC 11.

71. *Orozco v The Attorney General*, *supra* note 66 at 24.

72. *Ibid* at para 59.

73. *Vriend v Alberta*, 1998 1 SCR 493; *Law v Canada (Minister of Employment and Immigration)*, 1999 1 SCR 497.

74. *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1999 (1) SA 6.

75. *Dudgeon v UK*, 1981 ECHR 7525/76; *Norris v Ireland*, 1988 ECHR 105812/83; and *Modinos v Cyprus*, 1993 ECHR 15070/89.

76. *Orozco v Attorney General*, *supra* note 66 at 34.

that “the claimant had been discriminated against on the basis of sexual orientation.”<sup>77</sup>

The generosity of the courts in *Jones* and *Orozco* was, however, not duplicated in *Tomlinson v Belize* and *Tomlinson v Trinidad and Tobago*,<sup>78</sup> a twin decision of the Caribbean Court of Justice (CCJ), in its original jurisdiction.<sup>79</sup> In this case, the claimant asserted that immigration law provisions in both Belize and Trinidad and Tobago violated his Treaty right to free movement within CARICOM,<sup>80</sup> as those provisions expressly barred homosexuals from entry into those countries, subject to certain other provisions. In Belize, section 5 of the *Immigration Act* made “a homosexual” a “prohibited immigrant,” subject to an exemption based on the discretion of the Minister; in Trinidad and Tobago, under section 8 of the *Immigration Act*, entry into that country was “prohibited” to “homosexuals,” although the Minister could allow a homosexual to enter as a person “passing through...under guard to another country.” Tomlinson’s contention was a simple one; the provisions, in their plain meaning, could prevent him potentially from exercising his Treaty right to free movement within CARICOM, in so far as Belize and Trinidad and Tobago were concerned.

Perplexingly one might say, the Court in basic essence, relied partly on the act of state doctrine to determine that since both states did not actively enforce the impugned provisions, there was no violation of the Treaty. In my view, this was an unsatisfactory use of the law, which ultimately resulted in a missed opportunity. The approach taken by the Court did not fairly and effectively resolve the substance of the claimant’s contention. The provisions clearly stated that “homosexuals” were prima

77. *Ibid* at para 95.

78. *Maurice Tomlinson v The State of Belize and Maurice Tomlinson v The State of Trinidad and Tobago (consolidated)*, 2016 CCJ 1 (OJ) [Tomlinson].

79. The Caribbean Court of Justice is a regional court that has both an original jurisdiction and an appellate jurisdiction. Under its original jurisdiction, it hears cases from Caribbean Community (CARICOM) states that are signatories to the *Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy* (RTC), which is an international instrument governing relations between CARICOM Member States. The court’s original jurisdiction is, therefore, mandatory on matters arising for dispute settlement under the RTC. However, the appellate jurisdiction of the CCJ is optional. CARICOM Member States subscribe to that jurisdiction if they wish to. At this point, only four CARICOM states (Barbados, Guyana, Belize, and Dominica) have accepted the court’s appellate jurisdiction. As recently as November 2018, Grenada and Antigua and Barbuda held referenda on the question of joining the CCJ’s appellate Jurisdiction, but both referenda results rejected that idea. The *Tomlinson* cases were both decided in the CCJ’s original (Treaty) jurisdiction.

80. CARICOM, the Caribbean Community, was created in 1973 by the Treaty Establishing the Caribbean Community and its annex, The Caribbean Common Market, 4 July 1973, 946 UNTS 17, known as the Treaty of Chaguaramas. That treaty was replaced in 2001 by the RTC (see note 79).

facie, prohibited immigrants. The simple path for the Court ought to have been an interpretation of the clear literal meaning of the words used in the alleged offending sections, followed by a straightforward analysis of how, if at all, this would impact the Treaty right of free movement.<sup>81</sup>

While Trinidad and Tobago accepted that the *Immigration Act* in fact classified homosexuals as “prohibited persons,” Belize argued that only homosexuals who received the proceeds from homosexual behaviour, just as in the case of prostitutes, also covered in the section, were prohibited. In other words, the section was not disjunctive as in “prostitutes,” “homosexuals” and “any other person” living from the avails of prostitution or homosexuality. However, this interpretation was wholly implausible, and the Court resiled from a golden opportunity to pronounce on the flagrant and immutable discrimination that both provisions contained. This was a failure on the part of the Court to enforce international human rights norms and values in a way that it was clearly entitled to do.

Even accepting that the Court in its original jurisdiction was not per se a “human rights” court, it would have been on solid ground to employ international human rights law and hold that the provisions in question violated the Treaty obligations, based on Article 217(1) of the RTC, which states that “The Court, in exercising its original jurisdiction under Article 211, shall apply such rules of international law as may be applicable.” It is interesting to point out that in the *Tomlinson* decision, the Court even accepted that:

International human rights which have crystallized into customary international law form part of the common law of Trinidad and Tobago... [and that] this human rights approach may be seen as being in keeping with the Preamble of the 1976 Constitution...in its affirmation that ‘the nation...is founded upon principles that acknowledge...the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator.’ Section 4 of that Constitution...recognizes and declares fundamental human rights and freedoms, among them the right of the individual to equality before the law and protection of the law, and the right of the individual

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81. Section 5 of the Belize *Immigration Act* in relevant part reads, “Subject to section 2(3), the following persons are prohibited immigrants...(a)...(e) any prostitute or homosexual or any person who may be living on or receiving or may have been living on or receiving the proceeds of prostitution or homosexual behaviour...” For Trinidad and Tobago, section 8 of the *Immigration Act* reads in relevant part, “Except as provided in subsection (2), entry into Trinidad and Tobago of the persons described in this subsection, other than citizens and, subject to section 7(2), residents, is prohibited, namely...(a)...(e) prostitutes, homosexuals or persons living on the earnings of prostitutes or homosexuals, or persons reasonably suspected as coming to Trinidad and Tobago for these or any other immoral purposes....”



to respect for his private and family life.<sup>82</sup>

Notwithstanding this, however, the Court recoiled from holding that there had been a violation on the basis that it was “[u]ltimately...in the practical application of the legislation that...liability [was] grounded.”<sup>83</sup> The Court also readily took a second escape chute, by explaining that a separate Act in Trinidad and Tobago that dealt with the movement of skilled CARCOM nationals between Member States required an immigration officer “to permit entry...of skilled CARICOM nationals who present a skills certificate,” “notwithstanding any other written law.”<sup>84</sup> Suffice it to say, Tomlinson was not contesting a refusal to grant him entry into Trinidad and Tobago based on whether he presented a “skills certificate.” Instead, he was contesting an immigration law that had a provision antithetical to the actualization of a Treaty right, notwithstanding that it had never been applied to him in his earlier visits to the countries concerned. Indeed, it was a principled legal objection.<sup>85</sup>

Ultimately, the Court hesitated to pronounce on the interpretation of domestic law as it was functioning in its original jurisdiction (the single market and economy jurisdiction), and not in its appellate jurisdiction. The Court could, however, pronounce on the interpretation of domestic law in respect of Belize (which was subject to its appellate jurisdiction). The Court, maybe in an effort to avoid an inconsistent ruling on the Trinidadian situation (where that country was not subject to its appellate jurisdiction), simply *resolved* the matter by digressing into a ruling that Tomlinson had not been and was not likely to be prejudiced by the alleged offending statutory provision. The Court resolved the case in this way notwithstanding the fact that it knew Mr. Tomlinson’s position—having given him permission in a preliminary antecedent proceeding to proceed to a hearing of the case on the merits.

In the case of *Godwin and Deroche v The Registrar General and Attorney General*,<sup>86</sup> queer marriage was the touchstone issue. Both

82. Tomlinson, *supra* note 78 at paras 44-45.

83. *Ibid* at para 46.

84. Tomlinson, *supra* note 78 at para 49.

85. In fact, the Court pointed out in its judgment, “Tomlinson’s complaint was not based on any factual refusal of entry or otherwise wrongful treatment by Belize or Trinidad and Tobago. Rather it centres on the allegation that the Immigration Acts of these States prohibit the entry of homosexuals. Tomlinson argues that the mere existence of these laws is sufficient to prejudice the enjoyment of his Community rights” (*ibid* at para 3).

86. *Winston Godwin and Greg Deroche v The Registrar General and The Attorney General and The Minister of Home Affairs (and the Human Rights Commission and the Preserve Marriage Bermuda Limited—Intervenors)*, 2017 SC (Bda) 36 Civ (5 May 2017) (unreported) [*Godwin v Registrar General*]

applicants had argued that Bermudian law prohibiting them from marrying each other as gay men was a violation of the domestic *Human Rights Act*, 1981 (HRA). As a starting point of the Court's core analysis, it held as a matter of English common law,<sup>87</sup> by which it was bound, that marriage was an exclusive legal and emotional relationship between a man and a woman, thereby excluding the applicants, two men. The Court then considered section 15(c) of the *Matrimonial Causes Act*<sup>88</sup> which voided marriages in which "the parties [were] not respectively male and female." The Court considered further gender identifiers in the *Marriage Act* such as "man and wife" and "he or she" in section 23(4), in reference to the "parties to the marriage," or "husband" and "wife" in the same section. It then determined that "the Marriage Act and the [Matrimonial Causes Act]... [were] a statutory reflection of the common law impediment to same-sex marriage." The Court then proceeded to conduct the HRA analysis.

The Preamble to the HRA reveals its purposes as giving domestic law effect to international human rights conventions and protecting fundamental rights and freedoms found in the Bermuda Constitution. The Act makes express reference to international human rights instruments, the UDHR and the ECHR, which is a clear recognition of international human rights norms and rules.<sup>89</sup> The Court considered section 2(2) of the HRA, which speaks specifically to the prohibition of discrimination based on "sexual orientation," among other grounds. In advancing the human rights violation analysis, the *Godwin* court turned to South African jurisprudence dealing with the ills of discrimination against queer persons in society. The Court cited a decision of the South African courts, *Minister of Home Affairs and Another v Fourie and Another*,<sup>90</sup> and relied on an excerpt from the judgment of Sachs, J. in that case, that:

The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for

87. *Hyde v Hyde and Woodmansee* 918860 L.R. 1 P.&D. 130. At page 133 Lord Penzance formulated it this way—"I conceive that marriage...for this purpose [may] be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

88. *Matrimonial Causes Act*, 1974:74, Laws of Bermuda. The section reads in material part, "A marriage...shall be void on the following grounds only, that is to say—that it is not a valid marriage under the Marriage Act 1944; (a)...; (b)...; that the parties are not respectively male and female."

89. It is important to note however that Bermuda is in a politically different position to the other countries dealt with in this article, as it remains an Overseas Territory of the United Kingdom of Great Britain and Northern Ireland, and not an independent State.

90. 2005 ZACC 19 (Constitutional Court of South Africa).

affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.<sup>91</sup>

This conclusion was crystallized by the *Godwin* Court, having further held that the registrar general was in fact providing a service in the issuance of marriage permits and was, therefore, subject to the anti-discrimination provisions of the HRA under section 31(1).<sup>92</sup>

In an effort to both blunt and reverse the ground-breaking consequences and effect of the *Godwin* decision on Bermudian marriage laws, the Government of Bermuda enacted the *Domestic Partnership Act*, 2018 (DPA).<sup>93</sup> The critical provision was section 53, which emphatically—and highly unusually—made express reference to the decision of the Court in *Godwin*:

#### Clarification of the law of marriage

53. Notwithstanding anything in the Human Rights Act 1981, any other provision of law or the judgment of the Supreme Court in *Godwin* and *DeRoche v The Registrar General* and others delivered on 5 May 2017, a marriage is void unless the parties are respectively male and female. (Emphasis added.)

The challenge to section 53 came in *Ferguson v The Attorney General*.<sup>94</sup> The applicant was successful in the Bermudian High Court, leading to an appeal to the Court of Appeal of Bermuda (*Attorney General v Ferguson*),<sup>95</sup> and culminating again in victory for the respondent/claimant.

91. *Godwin v Registrar General*, *supra* note 86 at 33.

92. The section provides that it applies to “...(a) an act done by a person in the course of service of the Crown—[i] in a civil capacity in respect of the Government of Bermuda; or [ii] in a military capacity in Bermuda; or (b) to an act done on behalf of the Crown by a statutory body, or a person holding a statutory office, as it applies to an act done by a private person.”

93. *Domestic Partnership Act*, 2018:1, Laws of Bermuda.

94. *Roderick Ferguson v The Attorney General (and OUTBermuda, Maryellen Jackson, Gordon Campbell, Sylvia Hayward-Harris and The Parlor Tabernacle of the Vision Church of Bermuda v The Attorney General)*, 2018 SC (Bda) 46 Civ (6 June 2018).

95. *The Attorney General for Bermuda v Roderick Ferguson, OUTBermuda, Maryellen Jackson, Gordon Campbell, Sylvia Hayward-Harris and The Parlor Tabernacle of the Vision Church of Bermuda*, Civil Appeal Nos 11 and 12 of 2018, The Court of Appeal of Bermuda, delivered 23 November 2018 (unreported) [*Ferguson v Attorney General*].

At the Court of Appeal, the Court held that the revocation provision found in section 53 of the DPA was enacted for “a mainly religious purpose” to assuage the anti-gay marriage lobby group Preserve Marriage Bermuda (PMB).<sup>96</sup> This, therefore, brought the Court’s analysis squarely to discrimination on the basis of religion and creed. In conducting its analysis, the Court relied on human rights jurisprudence from Canada and the United Kingdom. Relying on *McFarlane v Relate Avon Limited*,<sup>97</sup> the Court of Appeal adopted the view that:

The promulgation of law for the protection of a position held purely on religious grounds cannot...be justified. It is irrational...But it is also divisive, capricious and arbitrary. We do not live in a society where all people share uniform religious beliefs. The precepts of any one religion...cannot, by force of their religious origins, sound any louder in general law than the precepts of any other...So, the law must firmly safeguard the right to hold and express religious belief, equally firmly, it must eschew any protection of such belief’s content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime.<sup>98</sup>

This was consistent with the Court’s application of the Supreme Court of Canada case *Mouvement Laïque Québécois v Saguenay*,<sup>99</sup> where McLachlin C.J. explained that the obligation that resides with the state to maintain, protect and preserve religious neutrality emerges from an evolving interpretation of what it means to have freedom of conscience and religion. In that connection, it behoves the state not to engage in any way that favours or hinders its neutral role on such matters. This, the Chief Justice explained, was a hallmark of a free and democratic society, which places an obligation on the state to motivate citizens to engage freely in public life irrespective of their beliefs. This accordingly enhances and gives strength to the multicultural nature of society. So, where the state is required to protect everyone’s freedom of religion and conscience, it must encourage the harmonious and non-conflictual expressions of both

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96. As the court pointed out, “Since 2015 opposition to same-sex marriage has been coordinated by Preserve Marriage Bermuda (PMB), a religious lobby created to oppose same-sex marriage. It has done so through petitions, demonstrations and court interventions as well as lobbying Members of Parliament. Its petition, which attracted over 9,000 signatures said: ‘We agree that marriage in Bermuda should remain defined and upheld as a special union ordained by God between a man and a woman.’ Other similar statements appeared on its website...PMB has the right to believe but it does not have the right to impose its beliefs on anyone else.” *Ibid* at para 34.

97. 2010 EWCA Civ 880.

98. *McFarlane v Relate Avon*, 2010 EWCA Civ 880 at paras 24-25.

99. 2015 2 SCR 3.

believers and non-believers in public life, such that one or the other does not become a detriment to any individual in the society.

The Bermudian Court of Appeal also applied the Canadian case of *R v Big M Drug Mart Ltd.*,<sup>100</sup> for the proposition that a law that infringed religious freedom was inconsistent with any fundamental right that protected such a freedom. As Dickson J noted in *Big M Drug Mart*:

Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the rights of others, no one is forced to act in a way contrary to his beliefs or conscience... In my view, the guarantee of freedom of conscience and religion prevents the government from compelling individuals to perform or abstain from performing otherwise harmless acts because of the religious significance of those acts to others. The element of religious compulsion is perhaps somewhat more difficult to perceive (especially for those whose beliefs are being enforced) when, as here, it is nonaction rather than action that is being decreed, but in my view, compulsion is nevertheless what it amounts to.<sup>101</sup>

In the context of Bermuda, section 8(1) of the Constitution was inexorable to the approach of the Court:

Except with his consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public or in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.<sup>102</sup>

It is little wonder therefore that the Court of Appeal sought grounding in the precedents it applied. Its logic was evidently a reflection of core international principles. As international human rights jurisprudence declares, while a state may possess the power to enact legislation that limits an individual's right to a given freedom, pursuant to the limitation provisions of such international instruments, such limitation of any person's rights can only be justified when, taken together with the protection of the rights and reputations of others, it is deemed necessary; or to meet the requirements of national security, public safety, order, morality or health; or for the general welfare of a democratic society. Such limitations are also required by international principles to be prescribed by

100. 1985 1 SCR 295.

101. *R v Big M Drug Mart*, 1985 1 SCR 295 at paras 95 and 133.

102. Schedule 2 to the Bermuda Constitution Order, 1968, section 8(1).

law, pursue a legitimate aim, and be necessary in democratic societies.<sup>103</sup> Any restrictions or limitations that fall outside of these parameters are, therefore, a violation of international law principles.

So, in the context of the reason for the DPA, as determined and pronounced by the Court of Appeal, while the law may have been “useful” to the objectives of PMB, or desirable to the likely majority of the Bermudian Christian population, that did not make it “necessary” in a democratic society. This was an opportunity at vindication for the right of same-sex couples in Bermuda to marry, which the Court of Appeal grasped with obvious clarity.

The final case for consideration is *McEwan v Attorney General*.<sup>104</sup> This is a judgment from the CCJ, involving a group of young men who were charged with wearing female attire in contravention of the *Summary Jurisdiction (Offences) Act*.<sup>105</sup> The appellants claimed that the provision of the Act material to this charge was *ultra vires* the Constitution of Guyana. The violations argued by the appellants were their right to equality and non-discrimination guaranteed under Article 149 of the Constitution and their right to freedom of expression pursuant to Article 146. They further argued that the provision violated Articles 40 of the Constitution (protection of the law) on account of the vagueness of the term “improper purpose,” which made it impossible for the citizen to guide their conduct and Article 144 (fair hearing), based on an apprehension of bias in certain remarks by the presiding magistrate about the need for the appellants to seek God and turn to religion to correct their behaviour.

In the lead judgment of the Court, the President offered a very poignant and inspired rendering of the importance of recognizing and respecting differences within societies. Holding the provision unconstitutional, Saunders P. cut to the heart of the matter:

Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due

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103. UNHCR Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/23/40 General Assembly; 17 April 2013 at paras 28-29.

104. *Quincy McEwan, Seon Clarke, Joseph Fraser, Seyon Persaud, Society Against Sexual Orientation Discrimination (SASOD) v The Attorney General of Guyana*, 2018 CCJ 30 (AJ) [*McEwan v Attorney General*].

105. Laws of Guyana, Cap 8:02, s 153(1)(xlvii). The section reads—“Every person who does any of the following acts shall, in each case, be liable to a fine of not less than seven thousand dollars... (i)...(ii)...(xlvii) being a man, in any public way or public place, for any improper purpose, appears in female attire, or being a woman, in any public way or public place, for an improper purpose, appears in male attire; or (xlviii)...”

respect to everyone's humanity. No one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order. It is these simple verities on which this case is premised.

In holding the provision to be a violation of the right to be protected from discrimination and of the right to free expression, the Court adopted the link between equality and dignity from the Inter-American Court of Human Rights, quoting from the Advisory Opinion on *Proposed Amendment to the Political Constitution of Costa Rica related to Naturalization*<sup>106</sup> where it stated that:

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified.<sup>107</sup>

The Court further relied on principles of equality and non-discrimination from the CEDAW<sup>108</sup> Committee,<sup>109</sup> as well as jurisprudence from several jurisdictions, among them, Canada,<sup>110</sup> India<sup>111</sup> and Belize.<sup>112</sup> In holding a violation of the right to be free from discrimination, the Court ruled that section 153(1)(xlvi) had a “disproportionately adverse impact on transgendered persons...[as it] infringes on their personal autonomy which includes both the negative right not to be subjected to unjustifiable interference by others and the positive right to make decisions about one's life...[The section also] reinforces stereotyping...[and] conduces to the stigmatization of those who do not conform to traditional gender clothing...thus enabling the state to unleash its full might against them... [This] cannot...be reasonably justified.”<sup>113</sup>

106. Advisory Opinion OC-4/84, 19 January 1984, Series A, No 4.

107. *McEwan v Attorney General*, *supra* note 104 at para 65.

108. UN General Assembly resolution 34/180, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol 1249 p 13, online: <<https://www.refworld.org/docid/3ae6b3970.html>> [<https://perma.cc/8JV8-GQM9>] or <<https://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>> [<https://perma.cc/2VY3-LAZD>]

109. General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the *Convention on the Elimination of All Forms of Discrimination against Women* at 22.

110. *Law v Canada*, 1999 1 SCR 497; *R v Oakes*, 1986 1 SCR 103; *Andrews v Law Society of British Columbia*, 1989 1 SCR 143.

111. *National Legal Services Authority v Union of India and Others*, 2014 4 LRC 629; 2012 Writ Petition (Civil) No 400.

112. *Roches v Wade*, 2004 Action No 132, The Supreme Court of Belize (delivered 30 April 2004).

113. *McEwan v Attorney General*, *supra* note 104 at para 72.



In a similar vein, relative to the violation of the right to free expression, the Court was equally resolute and unqualified in its protection of the appellants by asserting that:

No one should have to live under the constant threat that, at any moment, for an unconventional form of expression that poses no risk to society, s/he may suffer such treatment. But that is the threat that exists in section 153(1)(xlvii). It is a threat particularly aimed at persons of the LGBTI community. The section is easily utilised as a convenient tool to justify the harassment of such persons. Such harassment encourages the humiliation, hate crimes, and other forms of violence persons of the LGBTI community experience. This is at complete variance with the aspirations and values laid out in the Guyana Constitution...<sup>114</sup>

The *McEwan* Court also took the opportunity to strike down section 153(1)(xlvii) of the Act, as it determined that the phrase “improper purpose” was too vague to be constitutionally sound. This was entirely consistent with international human rights law, which establishes that in order for a human right to be justifiably fettered, the impediment must firstly be one that is “prescribed by law.” A restriction is prescribed by law<sup>115</sup> not only if it has a basis in domestic law *per se*—but also it is required to be accessible to the person concerned and foreseeable as to its effect.<sup>116</sup> A law is foreseeable if it is formulated with enough precision so as to enable an individual governed by it to properly regulate their conduct.<sup>117</sup> The Court in *Hashman and Harrup v United Kingdom*<sup>118</sup> also asserts that an Act is prescribed by law where the effects of that law are not so vague as to render them unpredictable. Further, as determined in *Pinkney v Canada*,<sup>119</sup> an Act is prescribed by law where it contains adequate safeguards to protect the citizen from arbitrariness. This was precisely the holding of the *McEwan* court when it ruled that:

a penal statute must meet certain minimum objectives if it is to pass muster as a valid law. It must provide fair notice to citizens of the

114. *Ibid* at para 79.

115. *The Sunday Times v The United Kingdom*, App no 13166/87 (ECtHR, 26 November 1991); *Silver and Others v The United Kingdom*, 1983 Series A no 61; *Telegraaf Media Nederland Landelijke Media B and others v The Netherlands*, App no 39315/06 (ECtHR 22 November 2012).

116. *Amann v Switzerland* App no 27798/95 (ECHR, 16 February 2000); *Liberty and Others v The United Kingdom* App no 58243/00 (ECtHR 1 July 2008); *Savovi v. Bulgaria* App no 7222/05 (ECtHR 27 November 2012).

117. *Malone v Commissioner of Police*, 2 August 1984; *Kruslin v France*, 1990 series A no 176 A; *Huvig v France*, 1990 Series A no 176 B.

118. App No 25594/94, 25 November 1999, 2000 30 EHHR 241, ECHR 199-VIII.

119. *Pinkney v Canada*, Merits, Communication No 27/1977, UN Doc CCPR/C/14/D/27/1977, IHRL 2845 (UNHRC 1981), 29 October 1981, Human Rights Committee [UNHRC]; *Al-Nashif v Bulgaria* App no 50963/99 (ECtHR, 20 June 2002).

prohibited conduct. It must not be vaguely worded...A law should not encourage arbitrary and discriminatory enforcement...The fact that no one can say with certainty what an improper purpose is or what male or female attire looks like, leaves transgendered persons in particular in great uncertainty as to what is not allowed. And to aggravate that injustice, it gives law enforcement officials almost unlimited discretion in their application of the law.<sup>120</sup>

On all major counts in this case, therefore, the Court followed and enforced international human rights law norms and rules.

#### IV. *TWAIL and Caribbean Queer Rights Jurisprudence*

From the discussion of the cases above, and the evidence provided, it is apparent that the courts do not share the neo-colonial/anti-imperialist narrative championed by TWAIL scholars. Nor do the courts' decisions reflect the anti-hegemonic rhetoric addressed by Smith & Kosobucki<sup>121</sup> and Massad<sup>122</sup> or the animus of the population relative to the situation in the Cayman Islands as reflected in Vlcek's analysis.<sup>123</sup> To the contrary, I would suggest that what has emerged is a passionate and decisive embrace and adoption of globalist international human rights norms and values, diligently and artfully brought to bear on an evolving Caribbean articulation of queer rights.

The integration by Caribbean courts of norms and guidance from wider international legal sources, or the jurisprudential solidarity that their queer rights opinion canvass, does not in my view diminish the integrity or indigeneity of the decisions in these Caribbean cases, neither does it totally assay the creative aspirations of the courts to craft a principled jurisprudential queer rights/human rights philosophy. Indeed, from the evidence offered, what the courts appear to do is to build their own framework of analysis based on the domestic constitutional and statutory human rights provisions (as in the *Human Rights Act* in the case of Bermuda), thereafter establishing the terrain for principled analysis and explication, with reference not only to domestic and regional jurisprudence but also to that which is extra-regional and international as well. This is an effort to advance a new blended enunciation for the protection of human rights (in particular, queer rights), which depicts not the usual anti-colonialist, TWAIL-like fervour and critique of international human rights law, but is rather an amalgamation of reasonable international human rights norms

120. *McEwan v Attorney General*, *supra* note 104 at paras 80 and 84.

121. Smith & Kosobucki, *supra* note 2.

122. Massad, *supra* note 3.

123. Vlcek, *supra* note 4.

and principles, and a respect for local conditions. This is somewhat similar to what Woessner describes as a mapping out of “a different conception of human rights altogether, one that looks not just at the clean centres of cosmopolitan power, but at the messier margins of provincial suffering.”<sup>124</sup> In other words, the courts are not simply rejecting international norms on equality, liberty and entitlement to human dignity, because of notions of imperialism versus parochialism or “core” versus “periphery” in relation to human rights, but are instead justifying and applying these norms in a contextual manner, not based purely on cultural values, but on fairness, the rule of law, and democratic values.

What this indicates is that there is a discernible judicial propensity to construct a framework of analysis that is not symptomatic of the precepts of the TWAIL approach, which triggers and reinforces historical and international political economy considerations of colonial “capture,” but rather to construct a framework that is based on pragmatism, objective reality and fundamental notions of human equality and dignity. This is enhanced by the courts’ domestication of these wider and more fundamental epitaphs of the rule of law, applied to the factual circumstances and imperatives before them. Consider, for instance, that prior to *McEwan* a person in Guyana could be arrested, charged, detained in custody, convicted and sentenced, simply for wearing a piece of clothing, more commonly worn by the opposite sex, that a police officer determined was for an “improper purpose.” What the Court did in that particular case was to wield a *tour de force* of objection to such arbitrariness and violation of an inherent entitlement to self-determination, thereby establishing a “normative” expectation in the law, that was not previously in existence. Now, while men dressing in perceived women’s clothing in public might not have been deemed to be a culturally acceptable course of conduct in the Caribbean prior to, or even with the *McEwan* decision the Court acceded to a legally higher calling—the protection of the rights to free expression and equality before the law that are essential to human dignity, particularly when no issues of public safety, public indecency or public health are implicated.

As TWAIL has it, international human rights law comes with what Parmar refers to as “ideological and historical baggage.”<sup>125</sup> If its concern is the suffering of particularly situated human beings, then, as a methodology,

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124. Martin Woessner, “Provincializing Human Rights? The Heideggerian Legacy from Charles Malik to Dipesh Chakrabarty,” in JoseI-Manuel Barreto, ed, *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge: Cambridge Scholars Publishing, 2013) at 68.

125. Pooja Parmar, “TWAIL: An Epistemological Inquiry,” (2008) 10:4 Intl Community L Rev 363 at 369.

the goals that it sets out to achieve “must be followed in ways that lead to conceptualisations that enable emancipatory interpretations and not replication of the past.”<sup>126</sup> This objective of “emancipatory interpretation” is what the courts seem to be embarking on, as an incremental disowning of hegemonic-based conceptualizations of things such as “buggery” and restrictions on marriage for example, which in the Caribbean have their roots and philosophical underpinnings in colonial history. By taking decisions such as those in *Orozco*, *Ferguson* and *McEwan*, the courts are engaging in a discourse of emancipation. They are formulating their own narratives of queer rights in their jurisprudence, through a process of organic evolution, which symbolizes liberation from the proverbial European colonial rule, rather than Eurocentric or Western imposition. To that extent, in choosing not to uphold rules and laws that are vestiges of this colonial era, and in safeguarding and vindicating queer rights, the Caribbean courts themselves are embarking on an emancipatory decolonial project.

In this context, I am, therefore, critical of the TWAIL approach to international human rights law, bearing in mind that it represents notions of the unactualized poignancy of domestic Third World culture in the promulgation of international human rights norms, as well as notions of resistance to “neo-colonial” and “imperialist” capture.<sup>127</sup> It is my argument that equality-seeking rights, in particular queer rights, in so far as the Caribbean is concerned, clearly create a tension with core elements of TWAIL. The question now becomes this: is there room for accommodation in TWAIL of equality-seeking queer rights in the Caribbean? Or, does the approach of the Caribbean courts ostensibly resolve the conflict with what amounts to a decisive distancing from judicial thinking that would reflect or image the TWAIL-like methodological approach to international human rights norms?

But what are norms and how are they to be understood? For convenience I borrow from Judge, et al. who explain that:

norms are “a model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges someone or something.” Norms depend on community perception, acceptance, and enforcement...[Further], norms [are] “informal social regularities that individuals feel obligated to follow because of an internalized sense of

126. *Ibid* at 368.

127. See Okafor & Agbakwa, “Re-Imagining,” *supra* note 29; Okafor, “Newness,” *supra* note 25; Okafor, “International,” *supra* note 28; Mutua, “Metaphor,” *supra* note 7; Mutua, “Ideology,” *supra* note 33; Anghie, “Imperialism,” *supra* note 38; Anghie, “Globalization,” *supra* note 26; Rajagopel, “Counter-Hegemonic,” *supra* note 46.

duty, because of a fear of external non-legal sanctions, or both.”...[T]he term “norm” refers to “both behaviour that is normal, and behaviour that people should mimic to avoid being punished... Thus although norms are outside of legal rules, they are important for legal governance.”<sup>128</sup>

Against this backdrop, I advance the proposition that international human rights norms should be the “standards of human behaviour that are accepted and expected”; the “model or standards accepted”; the social “regularities” that individuals should feel obligated to follow; and the behaviours that should be “mimicked”; where human freedom, dignity and equality are concerned. I argue that relative to the protection of human rights, such norms should not be predicated on nuanced cultural practices in and of themselves, without more, but should instead be viewed through the prism of whether or not such cultural and nuanced local practices reflect standards of human behaviour that embody freedom, equality and dignity. In other words, the objective standard should not be determined by a domestic majoritarian or religious view, pronouncement, or approach to a given course of conduct; rather, it should be determined according to whether or not enforcing such a view, pronouncement or approach, would be offensive to or inconsistent with “regularities” of human freedom, equality and dignity. Without this objective standard, I argue, there is the perennial risk (as I understand the resistance and political modus of TWAIL) that where certain Third World customs, cultures or practices are inconsistent with what are labelled or perceived as Western/First World international “human rights norms,” there would be some perception of neo-colonial imposition. The case law explored in this article does not support that TWAIL proposition, without more. Instead, what appears to be happening is that Caribbean courts are employing external laws and norms from the international human rights arena to evolve domestic ones. This is not a careless or reckless imposition of such external laws and norms, but rather, a context-driven, considered, rational and purposeful application of such laws and norms.

In the cases of *Orozco*, *Jones*, *Ferguson* and *Godwin*, one of the most forceful objections came from religious organizations, which essentially argued that “buggery” and gay marriage were not culturally acceptable, based on religious precepts that were “Caribbean norms.” Indeed, in *Ferguson*, as noted above, the Court explicitly found that the government acted out of religious motivation. In such a scenario, the question then becomes, should these cultural/religious *norms* prevail over international

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128. Elizabeth F Judge & Tenille E Brown, “Pokemorials: Placing Norms in Augmented Reality,” (2017) 50 UBC L Rev 971 at 991-992.

human rights *norms* of freedom, dignity and equality? The inescapable answer in my view is a resounding no. That is precisely the view taken by the courts in the decisions examined above.

One cannot help but underscore the irony of the “TWAILesque” approach of these religious organizations in their claim that permitting gay marriage and legalizing consensual “buggery” in private were offensive and disrespecting impositions of a neo-colonial “rescue” or “capture.” These religious/cultural norms were handed to Caribbean peoples by colonial rulers hundreds of years ago, and actually reflected colonial values at the time. Those former colonial “masters” have since changed their own laws on these issues; determined enclaves of Caribbean societies still continue to claim ownership of these antiquated laws on the basis of culture and religion, to defend against primacies of equality and non-discrimination. This is no different, for instance, from the irony in the perennial claim that Commonwealth Caribbean countries should abandon Her Majesty’s Privy Council in the United Kingdom and adopt their own final appellate court, in order to preserve local culture and protect against foreign culture, yet, as recent as November 2018, the populations of two Caribbean countries (Antigua and Barbuda and Grenada), rejected the adoption of the appellate jurisdiction of the CCJ as their final appellate court, in favour of the Privy Council, in separate referenda.<sup>129</sup> Symons et al. aptly capture this irony, in their discussion on polarization in international human rights sexuality law:

Opponents generally argue that legal treatment of sexuality should be determined at a national level and not mandated by international human rights instruments. Opposition is typically framed as a defense of sovereignty that resists imposition of western cultural values and identity categories. Ironically, strongly anti-colonialist governments in Asia, Africa, and the Caribbean now defend laws that were often introduced under the British colonial regime and the ‘tradition’ referred to is often the legacy of 19th century missionary teachings...<sup>130</sup>

So, can TWAIL be reconciled in its counter-hegemonic, imperialist political scholarly agenda, with the equality-giving queer rights jurisprudence of the Caribbean courts as examined in this article? I argue that there is space for accommodation based on core precepts of the *rule of law* and *democracy*. It could never be fairly or seriously argued that

129. “CCJ Disappointed with referenda Results in Grenada and Antigua and Barbuda,” *Caribbean 360.com* (7 November 2018), online: <<http://www.caribbean360.com/news/ccj-disappointed-with-referenda-decisions-in-grenada-and-antigua-barbuda>> [<https://perma.cc/55WH-GRVZ>]

130. Jonathan Symons & Dennis Altman, “International Norm Polarization: Sexuality as a Subject of Human Rights Protection” (2015) 7:1 *International Theory* 61 at 65.

“TWAILers” are antithetical to these core precepts and legal propositions. The variance comes where consideration is given to how international law norms and values are “normalized” across the international sphere, vis-à-vis domestic values and norms. The rule of law, as former United Nations Secretary General Kofi Anan explains:

refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>131</sup>

Concomitantly, democracy contemplates “...a system of justice and equality among people, as a process that recognizes the diversity in society and allows constant criticism of phenomena, relationships and processes. Democracy is at the same time both acquisition and instrument of freedom, justice and equal opportunities in society.”<sup>132</sup> In this connection, if the goal of both international human rights norms and TWAILers are justice and equality, then there cannot be much divergence, irrespective of whatever nomenclature is used, particularly where domestic constitutions create and enshrine these rights and norms. These domestic constitutions are typically organic, coming out of a process of consultation and very often, express consent through suffrage. As such, these constitutions must be taken to be the will of the people in the given jurisdiction in which they bear supremacy over all other laws.

In the cases discussed in this article, the various rights were anchored primarily in constitutional instruments. All the rights litigated were as common as rights come, namely freedom of expression, privacy, and equality in the law, and before the law. None of these are inconsistent with respect for democracy and the rule of law. Thus, the legitimacy offered or ascribed by the courts in the enforcement of these rights cannot be rooted in social preferences and idiosyncrasies that are attached to public opinions, expectations or preferences, or socio-cultural proclivities, but ought, and should be about the more omniscient values. As long as it is those core values that are being vindicated, then there ought not to be any viable

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131. The Secretary General, *Report on The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, UNSCOR, 2004 UN Doc S/2004/616 at para 6.

132. Milica Kastratovic, “Democracy,” (2015) 5 Intl J Economics & Law 27 at 28.



space for divergence between equality-seeking queer-rights interests and those who defend the TWAIL approach to international human rights norms and values.

### *Conclusion*

In the few years that queer rights have begun to become a feature of Caribbean human rights jurisprudence, Caribbean courts have been able to render a few amazing and ground-breaking decisions. From protecting gay marriage in Bermuda, to the destruction of the criminalization of “buggery” in Trinidad and Tobago and Belize, the earth has moved in Caribbean human rights jurisprudence. While these decisions are confined to domestic jurisdictions and may not have binding application across the entire region as a result of the varying constitutional arrangements that exist, persuasive precedents have nonetheless been set. It would be hard to envision major divergences in other parts of the Caribbean as similar cases are eventually brought to other Caribbean courts.

From this research, it is evident that Caribbean courts have thus far shown a willingness to be open-minded in reaching for fairness, by heavily engaging not only with queer rights jurisprudence and general human rights perspectives from a variety of extra-regional jurisdictions, but also from international bodies and institutions. This indubitably signifies a trajectory of channelling the Caribbean stream of queer rights to flow in unison, as far as is possible, with the stream of rights accepted and crystalized in international human rights law. Importantly, courts in the region are not thrusting into a realm of creative judicial activism of their own. Instead, they appear to only be bringing, as necessary, international human rights norms to bear on Caribbean judicial law-making where queer rights are concerned, so that a “made in the Caribbean” outcome which prioritizes equality and non-discrimination can be achieved.

What this tells us is that the rhetoric of counter-hegemony, resistance, West versus East, or North versus South, championed by TWAIL approaches to international law, are not fundamentally taking flight in Caribbean courts so far, nor do these approaches seem to be a part of the path that these courts are forging on queer rights. Instead, the courts are engaging persuasively and deliberately with these “outside” principles, breathing life into basic, core human rights norms and values that are already inherent in Caribbean constitutional regimes and laws. Many of these constitutions, in fact, are modelled in the images of international treaties such as the ICCPR and the UDHR, and as such, it is not as if these rights never existed. To the contrary, what is unfolding is an evolving articulation of these rights in a new discourse of queer rights in the Caribbean.

That is why, even though the approach of the courts to queer rights has not been shown to amplify or imbibe the TWAIL methodological perspectives, there can still be common ground between both the Caribbean jurisprudence on queer rights and TWAIL, as both operate within constructs that validate basic ideas of the *rule of law* and *democracy*. The rule of law dictates that there be respect for human dignity and for equality before the law, while democracy protects the entitlement of each individual to enjoy the opportunities of self-determination and self-actualization as every citizen, as long as public safety, order or morality, and public health are preserved. That is essentially what the courts in the Caribbean have thus far said in relation to queer rights, and that is what can also be said to be reasonable, fair and just. It is a leap of faith, that has great potential for Caribbean peoples, in a socio-cultural environment where fear and misunderstanding of differences abound.

